(4)

No. 10-786

In the Supreme Court of the United States

KINGDOM OF SPAIN, ET AL., PETITIONERS

v.

ESTATE OF CLAUDE CASSIRER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a district court may exercise subject-matter jurisdiction under 28 U.S.C. 1605(a)(3) over the Kingdom of Spain and its instrumentality, the Thyssen-Bornemisza Collection Foundation (Foundation), based on allegations that the Foundation has possession of a painting that was previously taken by the Nazi government in violation of international law.

2. Whether respondent must exhaust available remedies in Spain or Germany before being permitted to sue under 28 U.S.C. 1605(a)(3).

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
A The FSIA's expropriation exception permits the exercise of subject-matter jurisdiction over the Foundation 7
B. The FSIA's expropriation exception does not require respondent to exhaust remedies in Spain or Germany 16
C. Review by this Court is not warranted 18
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Abrahim-Youri v *United States*, 139 F.3d 1462 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998) 11
Agudas Chasidei Chabad of U.S. v. *Russian Fed'n*:
528 F.3d 934 (D.C. Cir. 2008) 19, 20, 22
466 F. Supp. 2d 6 (D.D.C. 2006), aff'd in part, rev'd in part and vacated in part, 528 F 3d 934 (D C Cir. 2008) 20, 22
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 13, 17
Dean v. *United States*, 129 S. Ct. 1849 (2009) 9
Garb v. *Republic of Poland*, 440 F 3d 579 (2d Cir. 2006), cert denied, 547 U.S. 1193 (2006) 16
Greenpeace, Inc. (U.S.A.) v. *State of France*, 946 F. Supp. 773 (C.D. Cal. 1996) 20

Cases—Continued: Page

Nemariam v. *Federal Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007), cert. denied, 540 U.S. 877 (2003) 14
Sarei v *Rio Tinto, PLC*, 550 F.3d 822 (9th Cir 2008) ... 21
Vencedora Oceanica Navigacion, S.A. v. *Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) 18, 19
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 11
Williamson County Reg'l Planning Comm'n v *Hamilton Bank*, 473 U.S. 172 (1985) 17

Treaty and statutes:

Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/59/508 (1984):
Art. 10 12
Art. 11 12
Art. 13 12
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq*:
28 U.S.C. 1602 12
28 U.S.C. 1603(a) 3
28 U.S.C. 1603(b) 3
28 U.S.C. 1604 3
28 U.S.C. 1605 (2006 & Supp III 2009) 3
28 U.S.C. 1605(a) (2006 & Supp. III 2009) 16
28 U.S.C. 1605(a)(2) 12
28 U.S.C. 1605(a)(3) ..... *passim*
28 U.S.C. 1605(a)(4) 12

Statutes—Continued. Page

28 U.S.C. 1605(a)(5) 12
28 U.S.C. 1605(a)(7) 10, 16
28 U.S.C. 1605(a)(7)(B)(i) 16
28 U.S.C. 1605A(a)(1) (Supp. III 2009) 10
28 U.S.C. 1610 (2006 & Supp. III 2009) 9
28 U.S.C. 1610(a)(3) 9
28 U.S.C. 1610(f)(1) (2006 & Supp. III 2009) 9
28 U.S.C. 1610(f)(1)(B) 9
Hickenlooper Amendment, 22 U.S.C. 2370(e)(2) 13, 14

Miscellaneous:

110 Cong. Rec. 19,557 (1964) 14
H R. Rep. No 1487, 94th Cong., 2d Sess. (1976) 12, 14
Restatement (Third) of the Foreign Relations Law of the United States (1987):
Vol. I 13
Vol. 2 17

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondent Claude Cassirer brought this action against the Kingdom of Spain and one of its instrumentalities, the Thyssen-Bornemisza Collection Foundation (petitioners in this Court). Respondent sought to recover a painting that allegedly had been confiscated from his Jewish grandmother by the Nazi government.[1]

[1] The original plaintiff, Claude Cassirer, died while this litigation was pending, and Cassirer's estate was substituted as the plaintiff. For purposes of this brief, the government refers to Cassirer rather than his estate as the respondent.

Respondent's grandmother, Lilly Cassirer Neuberger, owned a painting by Camille Pissarro entitled *Rue Saint-Honoré, Apres-Midi, Effet de Pluie*. After years of intensifying persecution of German Jews by the Nazis, Neuberger decided in 1939 that she had no choice but to leave Germany. Neuberger was required, however, to obtain permission from the Nazi government both to leave the country and to take any belongings with her. Pet. App. 3a, 5a-6a.

An art dealer appointed by the Nazi government, Jakob Scheidwimmer, refused permission for Neuberger to take the Pissarro painting out of Germany. He demanded that she surrender it in exchange for a payment of approximately $360, to be paid into a blocked bank account. Scheidwimmer subsequently traded the painting to another dealer, from whom it was confiscated by the Gestapo and sold at auction in 1943. After a series of intervening sales, the painting was purchased by Baron Hans-Heinrich Thyssen-Bornemisza, a prominent Swiss private collector. In 1993, Bornemisza sold his entire art collection, including the Pissarro painting, to the Foundation. The Spanish government gave $327 million to the Foundation to purchase the Bornemisza collection, and provided the Foundation with the Villahermosa Palace in Madrid for use as a museum. Pet. App. 6a-7a.

In 2000, respondent discovered that the Pissarro painting was on display at the Thyssen-Bornemisza Museum in Madrid. He requested return of the painting from Spain's Minister of Education, Culture and Sports, who was the Chair of the Board of the Foundation, but that request was refused. Respondent did not try to obtain the painting through judicial proceedings in Spain, nor did he pursue any other remedies in either Spain or

Germany before bringing the present action. Pet. App. 7a.

2. In 2005, respondent filed suit against the Kingdom of Spain (Spain) and the Foundation in the District Court for the Central District of California. For purposes of subject-matter jurisdiction over Spain and the Foundation, respondent relied on the "expropriation" exception in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(3). Although a foreign state is generally immune from suit in federal or state court under Section 1604 of the FSIA, Section 1605 establishes a number of exceptions to that general rule.[1] Specifically, the expropriation exception at issue here provides for subject-matter jurisdiction in any case

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3).

Respondent did not allege that petitioners had themselves taken the painting in violation of international law, but simply that they had purchased the painting decades after its unlawful seizure by the Nazi government. Respondent nonetheless argued that the expro-

[1] The FSIA defines a "foreign state" to include any agency or instrumentality thereof that meets certain conditions. See 28 U.S.C. 1603(a) and (b).

priation exception was applicable because the Pissarro painting had been confiscated from Neuberger by the Nazi government in violation of international law. Respondent thus maintained that this case is one "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). In order to satisfy the remainder of Section 1605(a)(3), respondent did not allege that the Pissarro painting was "present in the United States" in connection with any commercial activity carried on by petitioners. *Ibid.* Respondent did allege, however, that the painting was "owned or operated" by the Foundation, which was "an agency or instrumentality" of Spain that was "engaged in a commercial activity in the United States." *Ibid.*

Petitioners moved to dismiss the complaint on multiple grounds, including that the district court lacked subject-matter jurisdiction. The Foundation did not dispute that it owned the painting and was an agency or instrumentality of Spain, and neither petitioner disputed that the painting had been taken by the Nazis in violation of international law. See, *e.g.*, 2:05-cv-03459 Docket entry No. 13, at 1 (C.D. Cal. Feb. 28, 2006). Rather, petitioners challenged jurisdiction on three grounds. First, they argued that Section 1605(a)(3) permits jurisdiction only over a foreign state that itself has taken property in violation of international law. See *id.* at 4-6. Second, they argued that, even if a nonexpropriating state or its instrumentality could be subject to jurisdiction under Section 1605(a)(3), the Foundation was not "engaged in a commercial activity in the United States." See *id.* at 6-12. Third, they argued that respondent had failed to exhaust remedies in Spain or Germany. See 2:05-cv-03459 Docket entry No. 42, at 13-16 (C.D. Cal. June 9, 2006).

3. The district court rejected petitioners' argument that Section 1605(a)(3) applies only to expropriating states. See 2:05-cv-03459 Docket entry No. 37 (C.D. Cal. Apr. 27, 2006). In the court's view, the text of Section 1605(a)(3) "contains no indication that the sovereign in possession of the allegedly unlawfully expropriated property must be the entity that acted in violation of international law." *Id.* at 2. The court thus permitted discovery into whether petitioners had conducted sufficient commercial activities within the United States to permit jurisdiction under Section 1605(a)(3). *Id.* at 4.

After the parties had conducted that discovery, the district court denied the motions to dismiss. Pet. App. 100a-140a. As relevant here, the court rejected petitioners' remaining two arguments. First, it concluded that the Foundation was "engaged in a commercial activity in the United States" within the meaning of Section 1605(a)(3). *Id.* at 126a-133a. Second, the court held that "the plain language of Section 1605(a)(3) * * * contains no exhaustion-of-foreign-remedies requirement," and it concluded that "an exhaustion requirement should not be implied where Congress created no such obligation." *Id.* at 107a.

4. a. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 55a-99a. The court of appeals granted rehearing en banc, and the en banc court affirmed in relevant part. *Id.* at 1a-54a. The court first held that the district court had subject-matter jurisdiction over this action pursuant to Section 1605(a)(3). It reasoned that the statute's takings element, which is phrased in the passive voice, is satisfied whenever the case involves "rights in property taken in violation of international law." *Id.* at 17a (emphasis omitted) (quoting 28 U.S.C. 1605(a)(3)). The court con-

cluded that nothing in the FSIA's legislative history, other appellate decisions, or the Restatement (Third) of the Foreign Relations Law of the United States undermined its interpretation of Section 1605(a)(3). *Id.* at 18a-21a.

The en banc court further supported its conclusion by observing that "[Section] 1605(a)(3) restricts jurisdiction over an entity of a foreign state that owns property taken in violation of international law to those engaged in commercial activity in the United States." Pet. App. 21a-22a. The court reasoned that the exercise of jurisdiction in such circumstances is consistent with the purpose of the FSIA to subject foreign states or their instrumentalities to suit in United States courts for their commercial, but not for their sovereign, acts. *Id.* at 21a-23a. The court rejected petitioners' argument that Section 1605(a)(3) requires a nexus between petitioners' challenged conduct (*i.e.*, their ownership of the Pissarro painting) and their commercial activity in the United States. *Id.* at 27a-29a.

Finally, the en banc court held that Section 1605(a)(3) did not require respondent to exhaust remedies in Spain or Germany before bringing this suit. Pet. App. 30a-37a. The court observed that, on its face, Section 1605(a)(3) "contains no exhaustion requirement." *Id.* at 30a. The court reasoned that implying such an exhaustion requirement would be inconsistent with the FSIA's legislative history, which indicates that the Act "create[s] a comprehensive, and exclusive, set of legal standards governing claims of immunity in every civil action against a foreign state." *Id.* at 31a. The court declined to decide, however, whether on remand the district court could impose a prudential exhaustion requirement, because such a requirement would not affect

subject-matter jurisdiction under the FSIA. *Id.* at 36a-37a.

b. Judge Gould, joined by Chief Judge Kozinski, dissented. Pet. App. 38a-54a. In his view, Section 1605(a)(3) does not clearly apply to a foreign state that has not itself taken property in violation of international law, and various canons of construction counsel against such an interpretation. *Id.* at 40a-53a. Judge Gould indicated that, if he were to reach the question, he would interpret Section 1605(a)(3) to require exhaustion of foreign remedies. *Id.* at 43a n.3.

DISCUSSION

The court of appeals correctly held that the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3), permits a court to exercise jurisdiction over an instrumentality of a foreign state that owns property taken in violation of international law. The court also correctly held that Section 1605(a)(3) does not require that a plaintiff exhaust foreign remedies before bringing suit against the foreign instrumentality. Review of those holdings is not warranted. Neither is in conflict with any decision of this Court or of any other court of appeals. Indeed, petitioners identify only a handful of other cases involving these questions. Moreover, this case does not clearly present the mandatory exhaustion question, and in any event the court of appeals left open on remand the question of whether to require prudential exhaustion.

A. The FSIA's Expropriation Exception Permits The Exercise Of Subject-Matter Jurisdiction Over The Foundation

1. The court of appeals correctly concluded that the exception to foreign sovereign immunity in Section 1605(a)(3) applies in this case and permits the exercise

of subject-matter jurisdiction over the Foundation. The statute contains two jurisdictional prerequisites, and respondent's complaint satisfies both of them. *First*, Section 1605(a)(3) requires that a plaintiff's suit be one "in which rights in property taken in violation of international law are in issue." In his complaint, respondent alleges—and petitioners do not challenge before this Court—that the Foundation owns a Pissarro painting taken from respondent's grandmother by the Nazi government in violation of international law. See, *e.g.*, 2:05-cv-03459 Docket entry No. 1, at 8-9 (C.D. Cal. May 10, 2005). Respondent's "rights in property taken in violation of international law" are therefore very much "in issue" in this case.

Second, Section 1605(a)(3) requires either that the property be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or that the property be "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Here, respondent does not allege that the Pissarro painting is "present in the United States" in connection with any commercial activity carried on by Spain. But respondent does allege—and petitioners again do not challenge before this Court—that the Foundation is an instrumentality of Spain engaged in commercial activity in the United States. Respondent's complaint therefore satisfies Section 1605(a)(3)'s express requirements with respect to the Foundation.

2. a. Petitioners argue that the expropriation exception is ambiguous because "[it] does not expressly say" whether the property at issue must have been taken "by the [defendant] foreign state" or "by *any* foreign state,"

Pet. 18, and they contend that this supposed ambiguity should be resolved by requiring that the defendant foreign state have been the wrongdoer. But the absence of any reference to the responsible foreign state indicates that Congress was interested in the fact of the unlawful expropriation, not the identity of the expropriator. Congress drafted the exception to govern all cases "in which rights in property taken in violation of international law are in issue" (if the requisite nexus to commercial activity is also present), without regard to whether the defendant foreign state took the property or subsequently came into possession of it. As the court of appeals explained, "[t]he text is written in the passive voice, which 'focuses on an event that occurs without respect to a specific actor.'" Pet. App. 17a (quoting *Dean* v. *United States*, 129 S. Ct. 1849, 1853 (2009)). "Thus, the text already connotes '*any* foreign state,'" and the court interpreted the statute in accord with its most natural meaning. *Ibid.*

The FSIA's emphasis on the fact of a taking carries over to its provision governing attachment of a foreign state's property in the United States, 28 U.S.C. 1610 (2006 & Supp. III 2009). Section 1610(a)(3) parallels Section 1605(a)(3): it provides that certain property is not immune from attachment to execute "a judgment establishing rights in property which has been taken in violation of international law." But elsewhere in the FSIA's attachment provision, Congress concentrated on the identity of the expropriator. Section 1610(f)(1) permits the attachment of certain property owned by a foreign state found liable for terrorism, and refers to property "expropriated or seized *by* the foreign state." 28 U.S.C. 1610(f)(1)(B) (emphasis added). That is because the parallel jurisdictional exception permits suits

for monetary damages "against a foreign state" for terrorist acts committed by agents "of such foreign state." 28 U.S.C. 1605A(a)(1) (Supp. III 2009).[5] Where Congress has chosen to make an exception to foreign sovereign immunity turn not simply on the fact of expropriation but the identity of the expropriating state, it has said so in the FSIA. Congress has not so provided in Section 1605(a)(3).

b. Petitioners also assert that the expropriation exception was "intended to apply to foreign states that have committed a jurisdictionally-significant act." Pet. 22. That assertion begs the question of what act by a foreign state should be considered jurisdictionally significant. The text of the FSIA supplies the answer: If the case is one "in which rights in property taken in violation of international law are in issue," then the conduct that gives rise to jurisdiction is commercial activity in the United States by the foreign state or instrumentality: either (i) the expropriated property is "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or (ii) the property is "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. 1605(a)(3). Section 1605(a)(3)'s reliance on commercial activity in the United States by the foreign state or instrumentality as the jurisdictionally significant act is consistent with the general practice under the restrictive theory of immunity of abrogating such immunity based on commercial activities conducted by a foreign state in the forum

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[5] Section 1605A(a)(1) was formerly codified at 28 U.S.C. 1605(a)(7) (2006), and was separately codified in 2008.

state. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487, 488-489 (1983).

3. Petitioners ground their arguments in a number of policies and authorities outside the FSIA. None counsels in favor of a different interpretation of Section 1605(a)(3).

a. Petitioners argue (Pet. 10-11) that the decision below conflicts with the State Department's espousal policy. Espousal is the process by which the "government of the United States, usually through diplomatic channels, makes [a private citizen's claim] the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." *Abrahim-Youri* v. *United States*, 139 F.3d 1462, 1463 n.2 (Fed. Cir. 1997) (citation omitted). As petitioners note (Pet. 11), the State Department will consider espousing a claim of expropriation against a foreign government only if certain conditions are satisfied, including that (i) the claimed violation of international law is attributable to that foreign government, and (ii) the claimant has exhausted local remedies in the relevant country or demonstrated that exhaustion would be futile.

The State Department's espousal policy does not, and is not intended to, have any logical bearing on the proper interpretation of Section 1605(a)(3). The espousal policy governs when the United States will adopt the claim of one of its citizens for the purposes of state-to-state resolution; it does not govern whether the rights of U.S. citizens under international law have been violated in the first instance, let alone whether those citizens can satisfy the FSIA's expropriation exception and invoke the jurisdiction of federal courts. Indeed, one purpose of the FSIA was to enable private parties to

obtain—and, in some instances, to execute upon—judgments against foreign states or instrumentalities without the need for State Department espousal. Cf. 28 U.S.C. 1602; H.R. Rep. No. 1487, 94th Cong., 2d Sess., 8, 13, 27-29 (1976) (*1976 House Report*). There is no basis, then, for the State Department's diplomatic policy governing resolution of claims with foreign nations to limit the FSIA's exceptions to sovereign immunity for suits by private parties.

b. Petitioners contend (Pet. 27-28) that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. Petitioners cite no authority for that proposition, and in any event the FSIA subjects foreign states to suit in a variety of circumstances that do not involve any violation of international law. See, *e.g.*, 28 U.S.C. 1605(a)(2) (exception to foreign sovereign immunity for suits based on a foreign state's commercial activity in the United States); 28 U.S.C. 1605(a)(4) (same; suits in which certain rights in property in the United States are at issue); 28 U.S.C. 1605(a)(5) (same; suits based on certain types of tortious conduct); see also Convention on Jurisdictional Immunities of States and Their Property Art. 10, U.N. Doc. A/59/508 (2004) (exception to foreign sovereign immunity for claims arising out of certain commercial transactions); *id.* Art. 11 (same; claims relating to certain employment contracts); *id.* Art. 13 (same; claims arising out of ownership, possession, or use of certain property in the forum state).

c. Petitioners point (Pet. 16 n.9) to the Restatement (Third) of Foreign Relations Law of the United States (1987) (Restatement). Section 455 of the Restatement addresses the immunity of foreign states from jurisdiction, and it appears to contemplate that immunity is

withdrawn only for an expropriating state. See 1 Restatement § 455(3)(a) and (b) at 411; *id.* § 455 cmt. c at 412 (stating that jurisdiction is appropriate in part if "the property was taken by the foreign state in violation of international law"). But the Restatement was drafted in 1987, eleven years *after* the FSIA was enacted. And although the Restatement says that it "reflect[s] Section 1605(a)(3)" of the FSIA, *ibid.*, it adds a requirement—that the property at issue was "taken by the foreign state"—that is not present in Section 1605(a)(3), without indicating whether that choice of wording was meaningful, imprecise, or inadvertent. Even assuming that the drafters of the Restatement intended to address, *sub silentio*, jurisdiction over a nonexpropriating state, petitioners cite no authority for the proposition that the text of the Restatement (and its commentary) should control over the quite different and broad text of the FSIA itself.

d. Finally, petitioners rely (Pet. 20) on the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That provision was enacted following this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), which held that the act of state doctrine barred litigation of the ownership of property that had been expropriated by the Cuban government. *Id.* at 436-437. The Hickenlooper Amendment overturns that result. It provides that United States courts shall not "decline on the ground of the federal act of state doctrine to make a determination on the merits" in a case "in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking * * * by an act of that state in violation of the principles of international law."

22 U.S.C. 2370(e)(2). Petitioners contend (Pet. 20-21) that the Hickenlooper Amendment abrogates the act of state doctrine only for expropriating states, and the FSIA's waiver of foreign sovereign immunity should be interpreted in parallel fashion.

As an initial matter, it is not established that the Hickenlooper Amendment denies an act of state defense to a foreign state only if that state confiscated the property at issue, and petitioners cite no authority for that proposition. Senator Hickenlooper, when explaining the amendment, specifically noted that it would "discourage purchases of expropriated property since the purchasers would be unable to rely automatically on the act of state doctrine and would have to establish their lack of notice of the violation of international law that took place in the seizure." 110 Cong. Rec. 19,557 (1964). Nothing in this statement suggests that it did not apply equally to a foreign state that purchased property that had been expropriated by another foreign state.

In any event, Congress "intended that the expropriation exception to foreign sovereign immunity operate independently from the Hickenlooper Amendment's exception to the act of state doctrine." *Nemariam* v. *Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007); see *1976 House Report* 20 (explaining that the FSIA's expropriation exception "deals solely with issues of immunity" and "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable"). Although the FSIA authorizes United States courts to exercise subject-matter jurisdiction over a foreign state or instrumentality that possesses property that was unlawfully expropriated, the FSIA does not itself affect the substantive liability of those foreign entities. Thus, whether the plaintiff has

a valid cause of action or whether the foreign state has a valid defense, including one based on the act of state doctrine, does not affect the jurisdiction of United States courts to adjudicate those questions.

4. Petitioners apparently assumed below that (and the court of appeals therefore did not address whether) if Section 1605(a)(3) permits jurisdiction over the Foundation, it also permits jurisdiction over the Kingdom of Spain. That assumption is erroneous. If an action is one "in which rights in property taken in violation of international law are in issue," then Section 1605(a)(3) requires either of two types of commercial activity in the United States: (i) the expropriated property must be "present in the United States in connection with a commercial activity carried on in the United States *by the foreign state*," or (ii) the property must be "owned or operated *by an agency or instrumentality of the foreign state* and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. 1605(a)(3) (emphasis added).

Whether jurisdiction exists over the foreign state depends on which prong of Section 1605(a)(3) the plaintiff invokes. Where a plaintiff alleges that the property at issue "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is "owned or operated by an agency or instrumentality of the foreign state * * * engaged in a commercial activity in the United States," then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, not the foreign state. *Ibid.*; cf.

Garb v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006).

Counsel for respondent has informed this Office that on remand before the district court respondent would not oppose a motion to dismiss the Kingdom of Spain from this case. Because the Foundation would still be subject to jurisdiction before the district court, and because the Foundation and Spain have a shared interest in opposing the relief that respondent seeks, it is conceivable that Spain would choose not to seek to be dismissed as a party. But the fact that Spain may not ultimately be subject to the district court's jurisdiction—and in any event that other foreign states should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities—significantly diminishes the potential impact on foreign relations of the decision below.

B. The FSIA's Expropriation Exception Does Not Require Respondent To Exhaust Remedies In Spain Or Germany

1. The court of appeals correctly held that Section 1605(a)(3) does not mandate that a plaintiff exhaust foreign remedies before bringing suit against a foreign state or instrumentality. Section 1605(a)(3) itself says nothing about exhaustion. That is in contrast to the former Section 1605(a)(7), which required that a plaintiff suing a foreign state for state-sponsored terrorism "afford[] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." 28 U.S.C. 1605(a)(7)(B)(i) (2006). Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3).

In addition, the FSIA's expropriation exception was enacted following this Court's decision in *Sabbatino*, which declined to adjudicate claims to property expropriated by the Cuban government. See p. 13, *supra*. The FSIA's expropriation exception provides for subject-matter jurisdiction over certain such suits—*i.e.*, it prevents a foreign entity from invoking sovereign immunity when a plaintiff alleges a taking in violation of international law and demonstrates that the foreign entity carries on the requisite commercial activity in the United States. In *Sabbatino* itself, the Court noted that Cuba had "formally provided" a system of compensation for expropriated property, although "the possibility of payment under it may well be deemed illusory." 376 U.S. at 402; see *id.* at 402 n.4. It is unlikely that Congress intended to require the victims of expropriation abroad to exhaust foreign remedies, whether real or illusory, and yet said nothing about it in Section 1605(a)(3).

2. Petitioners invoke (Pet. 29-32) international law, but there is no requirement in international law that a plaintiff must exhaust local remedies for a viable expropriation claim to arise. To be sure, if a taking of property by a foreign state is for a public purpose and is not discriminatory, then the taking violates international law only if it is not accompanied by prompt, adequate, and effective compensation. 2 Restatement § 712(1)(c) & cmt. c at 196, 198. Accordingly, for those types of takings, a plaintiff may need to have pursued and been denied compensation in the foreign state for there to be a ripe taking claim at all. Cf. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985). But where, as here, the taking violated international law because it was not for a public purpose

or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation. In any event, these considerations go to whether a taking in violation of international law has occurred, and here petitioners concede that such a taking occurred. Accordingly, to the extent that these considerations bear at all on this case, they can be taken into account on remand in determining whether exhaustion should be required as a prudential matter. See p. 21, *infra*.

C. Review By This Court Is Not Warranted

The court of appeals' decision does not warrant review at this time. With respect to both questions presented, the decision below is not in conflict with any decision of this Court or of any other court of appeals. Indeed, petitioners identify only a few other cases involving either question. Moreover, this case does not clearly present the issue of mandatory exhaustion, and the court of appeals left open on remand whether to require prudential exhaustion.

1. Petitioners incorrectly assert that the court of appeals' immunity ruling is in "significant tension" with decisions of the Fifth and District of Columbia Circuits. Pet. 6; see Pet. 15-17 ("Two other circuits have reviewed Section 1605(a)(3) and recognized that this immunity-stripping exception applies to nations that themselves have expropriated property in violation of international law."). Neither of those decisions addresses whether a nonexpropriating foreign state or instrumentality may be subject to suit under Section 1605(a)(3).

In *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984) (per curiam) (*Vencedora*), a

shipowner brought suit against the Republic of Algeria and one of its instrumentalities for expropriating a vessel off the Algerian coast. *Id.* at 196. Because the defendants were alleged to have taken the vessel, the Fifth Circuit had no occasion to address whether Section 1605(a)(3) also reaches a nonexpropriating foreign state or instrumentality. Indeed, without deciding whether the vessel had been "taken in violation of international law," *id.* at 204, the Fifth Circuit held that jurisdiction did not lie under Section 1605(a)(3) because the vessel was not "owned or operated" by the Algerian defendants, *ibid.* That issue is not at dispute here: the parties agree that the Foundation owns the Pissarro painting.[4]

By contrast, in *Agudas Chasidei Chabad of United States* v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) (*Chabad*), a Jewish organization brought suit against the Russian government to recover two sets of religious materials; the first set had been seized by the Russian government in 1917 and the second set by Nazi forces in 1939. *Id.* at 938. On appeal, Russia did not challenge the district court's ruling that "[f]or the purposes of the FSIA, the defendant-state need not be the

[4] In the course of holding that the Algerian defendants did not own or operate the expropriated vessel, the Fifth Circuit stated that "[S]ection 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated property without compensation, or that is using expropriated property taken by another branch of the state." *Vencedora*, 730 F.2d at 204. It is certainly true, as the Fifth Circuit recognized, that Section 1605(a)(3) applies to an expropriating foreign state. But the question here is whether Section 1605(a)(3) also applies to a nonexpropriating foreign state. That question was not at issue in *Vencedora*, and the Fifth Circuit's statement did not purport to delineate the outer bound of the expropriation exception.

state that took the property in violation of international law." *Chabad*, 466 F. Supp. 2d 6, 19 (D.D.C. 2006). Russia did contend that property had not been taken in violation of international law, and the District of Columbia Circuit therefore framed the issue as whether "the defendant (or its predecessor) has taken the plaintiff's rights in property * * * in violation of international law." *Chabad*, 528 F.3d at 941. But the court was not somehow suggesting that Section 1605(a)(3) precludes jurisdiction over a nonexpropriating foreign state. That issue simply was not before the court of appeals in *Chabad* and the court therefore did not address it.

2. Petitioners do not assert that the court of appeals' exhaustion ruling is in conflict with any decision of this Court or of any other court of appeals. Nor does this case even present a suitable occasion for addressing whether a plaintiff must exhaust any available foreign remedies before bringing suit under Section 1605(a)(3). As a threshold matter, petitioners do not make clear whether they believe that Section 1605(a)(3) requires exhaustion in the foreign state that committed the taking in violation of internation law (here, Germany), the state whose instrumentality owns or operates the expropriated property (Spain), or both. Petitioners appear to argue that exhaustion is required only in "the State where the violation has occurred." Pet. 31 (quoting *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996)); see Pet. 29-32 & n.12.

Even assuming, *arguendo*, that this argument is correct, there is no evidence in this record indicating that any remedies have been in the past or are currently available in Germany to compensate for an unlawful tak-

ing of property by the Nazi regime.[6] That evidentiary point is important because, even on petitioners' approach, exhaustion is required only if foreign remedies have been available to a plaintiff at some point in time. See Pet. 30 (arguing that there is no taking in violation of international law "until the claimant has exhausted *available* remedies") (emphasis added). Accordingly, it is not clear whether a mandatory exhaustion requirement would matter on the facts of this case.

Moreover, although the court of appeals held that "the expropriation exception does not *mandate* exhaustion," it left open the possibility that "exhaustion *may* apply to the claims asserted in this case." Pet. App. 36a. The court did not reach that question, because "[u]nlike statutory exhaustion, * * * '[j]udicially-imposed or prudential exhaustion is not a prerequisite to the exercise of jurisdiction.'" *Ibid.* (quoting *Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 828 (9th Cir. 2008)) (en banc) (first set of brackets added). The court of appeals' decision thus leaves petitioners free to argue on remand, and the district court free to decide, that respondent should be required to exhaust foreign remedies as a prudential matter before the district court will entertain his claims. Because the record is undeveloped on whether foreign remedies are even available, the better course is for the parties to litigate that question and the need for prudential exhaustion before the district court.

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[6] Petitioners note that "Germany, following World War II, implemented an extensive process to compensate the victims of Nazi persecution." Pet. 29 n.12. Petitioners do not, however, identify any specific remedy that was or is available in Germany to compensate respondent for the value of an artwork taken by the Nazi government in violation of international law.

3. Finally, the issues presented in this case do not seem to arise frequently. With respect to the immunity ruling, the government is aware of no circuit court decision and only three district court decisions addressing that question, and all agree with the decision below that Section 1605(a)(3) permits jurisdiction over a nonexpropriating foreign state or instrumentality. See Br. in Opp. 10-11 (collecting decisions). With respect to the exhaustion ruling, the government has identified only one circuit court decision addressing that question. In *Chabad*, the district court held that Section 1605(a)(3) does not require, as a precondition to the exercise of jurisdiction, that a plaintiff exhaust available remedies in the foreign state that is alleged to have engaged in a discriminatory and unlawful taking of property, 466 F. Supp. 2d at 20-21, and the court of appeals concluded that holding was "likely correct," 528 F.3d at 948-949. Given the lack of decisional authority and the uniformity of what authority exists, there is no need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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